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No. 278.

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IN THE

Supreme Court of the United States.

B. M. PATTERSON, EDWARD JANSEN, SVEN FREEMAN, et al.,

Appellants,

v.

The Bark "EUDORA," Whereof ALFRED E. DICKSON is Master.

A Certificate from the United States Circuit Court of Appeals for the Third Circuit.

Brief of Argument for Appellants.

JOSEPH HILL BRINTON,
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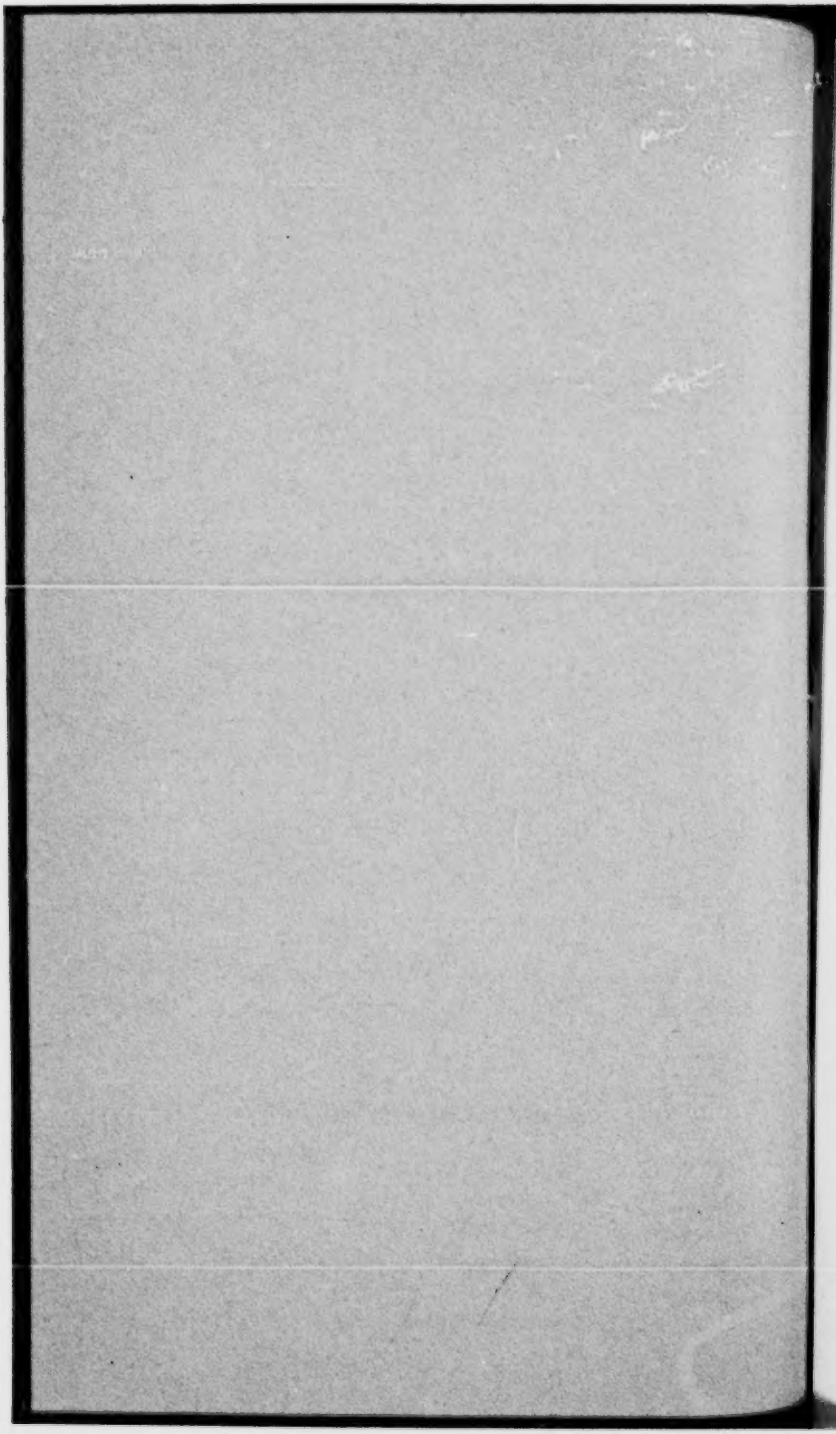

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Supreme Court of the United States.

October Term, 1902.

No. 278.

B. M. PATTERSON, EDWARD JANSEN, SVEN FREEMAN, *et. al*,

Appellants,

v.

Bark "EUDORA" whereof ALFRED E. DICKSON is Master.

On a certificate from the United States Circuit Court of Appeals for the Third Circuit.

STATEMENT OF THE CASE.

The appellants filed a libel for wages against the British bark "Eudora" in the District Court of the United States for the Eastern District of Pennsylvania, sitting in Admiralty. An agreed statement of facts was filed to the effect that on January 22, 1900, while in the port of New York, the said bark sailing under the British flag regularly shipped and hired

the libellants, some of them being American citizens, to serve as seamen thereon for and during "a voyage from Portland, Maine, to Rio, and for any ports or places within the limits of 65 degrees north and 70 degrees south latitude, trading to and fro as required, not to exceed twelve calendar months; final port of discharge to be in the United States of America or Canada, at the rate of one shilling for forty-five days and twenty dollars per month thereafter." That at the time of shipment the sum of twenty dollars was paid on account of each of the libellants and with his consent, to the shipping agent, through whom the libellants were employed. That the libellants performed their duties, and upon the completion of the voyage, on March 3, 1900, at Philadelphia, Pennsylvania, demanded wages for the full term of service at the rate of twenty dollars per month. That the said contract of shipment and payment of the sum of twenty dollars as advanced wages on account of each of the libellants to the shipping agent as aforesaid, were not contrary to or prohibited by the laws of Great Britain, but that the said payment was contrary to the Act of Congress of December 21, 1898 (if that act be properly applicable to the contract in this case). Upon consideration of this statement and argument, a decree was entered dismissing the libel, whereupon an appeal was had to the Circuit Court of Appeals for the Third Circuit, which Court, by virtue of the provisions of the sixth section of the Act of Congress, approved March 3, 1891, certified the following questions to this court for a proper decision of the cause, viz.:

"*First.*—Is the Act of Congress of December 21, 1898, properly applicable to the contract in this case?

Second.—Under the agreed statement of facts above set forth upon a libel filed by said seamen, after the completion of the voyage, against the British vessel, to recover wages which were not due to them under the terms of their contract or under the law of Great Britain, were the libellants entitled to a decree against the vessel?"

ARGUMENT.

Is the Act of Congress of December 21, 1898, properly applicable to the contract in this case?—or, in other words,

(I.) Does this act comprehend the shipment of a crew on a foreign vessel within the territory of the United States?—and, if so,

(II.) Has Congress legislative power to act?

(I.)

The Act is entitled "An Act to amend the laws relating to American seamen, for the protection of such seamen, and to promote commerce"; but, before considering the substance of the Act, it is desirable to notice the more recent Acts leading to its adoption.

The first legislative enactment prohibiting advance wages was the Act of June 26, 1884, entitled, "An Act to remove certain burdens on the American Merchant Marine, and encourage the American foreign carrying trade, and for other purposes"; and this Act contained a clause making it applicable to foreign vessels as well as vessels of the United States.

This Act was amended by the Act of June 19, 1886, Chap. 421, entitled, "An Act to abolish certain fees for official services to American vessels, and to amend the laws relating to shipping commissioners, seamen and owners of vessels, and for other purposes." In this Act the clause relating to foreign vessels was omitted, and the following substituted therefor:

> "And any master, owner, consignee or agent of any foreign vessel who has violated this section shall be liable to the same penalty that the master, owner or agent of a vessel of the United States would be for a similar violation."

Even though the full meaning of the legislature was not expressed in the Act of 1884, in its endeavor to regulate the shipment of seamen on foreign vessels, all doubt was dispelled by the later Act, in which the legislature was almost labored in its emphasis of the broad scope to be given to the Act in the establishment of uniform shipping laws.

The law thus remained until December 21, 1898, when the Act now under consideration was passed. This Act was designed to generally codify the then existing Acts relative to the service of seamen, as well as to modify or repeal all Acts inconsistent with their welfare, and to generally promote the interests of commerce. Some of its sections are limited to American vessels and to seamen shipping thereon. For instance Section 5 provides, that "Every seaman of a vessel of the United States shall be entitled to receive, at any port, one-half part of wages then due." Many sections expressly relate to foreign vessels in American ports. Section 24 provides as follows:

> "That Section X of Chap. 121 of the laws of Eighteen hundred and Eighty-four, as amended by Section three of Chapter 421 of the laws of Eighteen hundred and Eighty-six, be and is hereby amended to read as follows:
>
> "Section 10. (*a*) That it shall be, and is hereby made unlawful in any case to pay any seaman wages in advance of the time when he has actually earned the same, or to pay such advance wage to any other person. Any person paying such advance wages shall be deemed guilty of misdemeanor, and upon conviction shall be punished by a fine not less than four times the amount of the wages so advanced, and may also be imprisoned for a period not exceeding six months at the discretion of the Court. The payment of such advance wages shall in no case, excepting herein provided, absolve the vessel or the master or owner thereof from full payment of wages after the same shall have been actually earned, and shall be no defence to a libel, suit or action for the recovery of such wages. If any person shall demand or receive, either directly or indirectly, from any seaman or

other person seeking employment as seaman, or from any person on his behalf, any remuneration whatever for providing him with employment, he shall for every such offense be liable to a penalty of not more than one hundred dollars.

"(*f*) That this section shall apply as well to foreign vessels as to vessels of the United States and any master, owner, consignee or agent of any foreign vessel who has violated its provisions shall be liable to the same penalty that the master, owner or agent of a vessel of the United States would be for a similar violation; provided that treaties in force between the United and foreign nations do not conflict.

(*g*) That under the direction of the Secretary of the Treasury the Commissioner of Navigation shall make regulations to carry out this section. This section shall not apply to fishing or whaling vessels or yachts."

Clause (*f*) as above is merely a re-enactment of the Act of 1886, and throughout the entire Act no ambiguity suggests itself.

The payment of wages in advance "*in any case to any seaman*" is declared unlawful and the section is expressly applicable to foreign vessels as well as vessels of the United States. Notwithstanding this, the learned Judge of the District Court sought to confine its operation to American seamen, whom he defined to be "seamen of any nationality whatever, shipping on board American vessels." His conclusion was based not upon the body of the Act, but upon the title merely.

Is the Act capable of such a construction? It aimed to abolish extortion as practiced by shipping agents, which was facilitated by the payment of advance wages. Every seaman shipping in an American port was subjected to dishonest exaction. Congress becoming sensible of the extent of this evil, and deeming it proper to interfere, passed an Act for the removal of "certain burdens on the American merchant marine." Whether or not these Acts were necessary or benign, forms no part of this inquiry, and we are lim-

ited to their plain intendment. The payment of wages to seamen in advance of the earning of the same, was thought to be injurious and was therefore prohibited. This prohibition extended as well to foreign as domestic vessels, since, in order to be of any protection to seamen, it had, of necessity, to be general, and apply to all vessels trading here. Otherwise, foreign vessels would acquire an advantage in the selection of crews (through the agency of dishonest shipping agents) which would greatly facilitate their shipment, and thus vitiate the very purpose of the Act for extending general relief to the seamen shipping here. One of the purposes of the Act of June 6, 1884, as declared by its title, was to encourage Americans in foreign carrying trade, and in order to give effect to this purpose it would be necessary that they be placed at no disadvantage. Two years later Congress, desiring to emphasize the perfect equality of foreign and domestic vessels shipping here, with painstaking elaboration so declared its purpose.

Under these earlier acts, there was no question as to their applicability to the shipment of all seamen on American soil.

Judge BROWN, in the *State of Maine*, 22 F. R., 734, ruled that this legislation could not be held to include the shipment of crews by American vessels on foreign soil, believing that the Act was intended to apply to foreign and American vessels shipping in American ports. The court there said :

> " The final clause of section 10, which declares that 'this section shall apply as well to foreign vessels as to vessels of the United States' and that in case of violation, a clearance shall be refused them, furnishes a specific indication that Congress did not in this section refer to the shipment of seamen in foreign ports, but had in view acts done in this country alone. For it is manifest that, as against foreign vessels, in foreign ports, not only would this whole section be mere *brutum fulmen*, but the specific provisions, just referred to, would be wholly inapplicable. Its only possible legal application to foreign vessels would be as regards their acts while within the ports of this country. *And as the intent of the*

section is clear, to make no discrimination between foreign vessels and domestic vessels, and as the section as to foreign vessels cannot possibly be applied as regards their acts done in foreign ports, it follows that the whole section must be deemed intended to apply to the ports of this country only."

Does the substantial re-enactment of these earlier Acts, under a comprehensive title, limit the scope of its beneficial operation? Since Congress determined that payment of advance wages was detrimental to seamen (which practice had been checked by Congress) it is impossible to assign any sufficient reason for materially limiting the field of operation of this re-enactment since it would create unnecessary and prejudicial confusion. In the absence of some positive provision in the Act to that effect no Court has the right to usurp the prerogative of the legislature and read into the Act such a qualification.

Not one word can be found in the Act or the prior legistion, indicating other than a fixed determination to abolish an alleged abuse in the shipment of seamen on American soil. Reason seemed to dictate such a course and right and justice to require it. The learned court below, however, was of the opinion that the Act could have no application to the libellants " because the statute, as its title declares, is intended to amend the laws relating to American seamen, for the protection of such seamen and to promot ecommerce, and it cannot therefore apply to seamen, even if they are Americans by birth or naturalization, that have regularly shipped upon a British vessel and have thereby become British seamen for the time being. " Such a distinction is too nice a one to be drawn from an Act so wholly free from ambiguity, and such a construction would create an evil, rather than correct one, materially fetter the American carrying trade, lead to mischievous irregularity and confusion of practice beyond the intent of any reasoning legislature, and would outrage all recognized canons of construction.

It is true, the title of the Act does refer to an amendment

of the laws relating to American seamen, but it also includes *the protection of such seamen.* They can only be protected by a general application of the Act to all seamen shipping on our soil, irrespective of the nationality of the vessel. Can this portion of the title be ignored, the body of the Act be thus superseded, and a portion unnecessary for a sensible comprehension be accorded a useless dominance? "*Any seaman in any case*" must refer to seamen shipping under American laws. But even were this not so, clause (F) dispels all doubt as to the legislative intent. The prohibition extending as well to foreign as to domestic vessels places all crews shipping here indiscriminately upon the same footing and precludes a different construction. To hold otherwise would be to totally disregard this Section of the Act and to admit the dominance of one clause in the title. The title is broad enough to comprehend the content of the Act, because the prohibition of the payment of wages in advance is intended "for the protection of such seamen, and to promote commerce;" but even were this not so, the title cannot be resorted to to alter the plain, direct, indubitable provisions of the Act. An intelligent reading of the Act would seem to carry conviction as to its meaning and exclude argument. Since however the learned Judge of the District Court viewed the matter in a different light it becomes the duty of the appellants to treat it thoughtfully. It is, nevertheless, a principle too universally recognized to require extensive citation of authorities, that the title can only be resorted to as a means of construction where an ambiguity exists in the language of the Act, or where a usual construction would lead to absurdity.

Endlich on Interpretation of Statutes, Section 58, says:

> "It has long been established by numerous judicial decisions or *dicta*, from Lord COKE to the present time, that the title of a statute is not a part of the statute, and is to be therefore excluded from consideration in construing the statute. 'The title cannot be resorted to,' says Lord COTTENHAM, 'in construing the enactment.' 'The title, though it has occasionally been referred to as aiding

in the construction of an act, is certainly no part of the law,' it is said by the Court of Exchequer in a well-known and considered judgment, 'and in strictness ought not to be taken into consideration at all.' "

"Section 59 says: 'But unless the Constitution imperatively prescribes a different relation between the title and the body of the act, the rule remains that the former may be consulted in aid of the interpretation of the latter only in cases of ambiguity and uncertainty in its provisions, in aid, if need be, of their construction. It can never control the plain and unambiguous meaning of the language of the statute nor be used to extend or restrain its positive provisions; so that, even in the interpretation of a penal law, if the words of the enacting clause are broader than the title the former must govern.' "

Chief Justice MARSHALL said, in *United States* v. *Fisher*, 2 Cr., 358, 386:

"Neither party contends that the title of an act can control plain words in the body of the statute, and neither denies that, taken with other parts, it may assist in removing ambiguities. Where the intent is plain nothing is left to construction. Where the mind labors to discover the design of the legislature, it seizes everything from which aid can be derived; and in such case the title claims a degree of notice and will have its due share of consideration."

The District Court below seems to have reversed this principle in adhering to the belief that the title of the Act not only defines its limitations, but is paramount to it, in saying, "It (the Act) cannot therefore apply to seamen, even if they are Americans by birth or naturalization; they have regularly shipped upon a British vessel, and have thereby become British seamen for the time being." The Court based its opinion on a misconception of the decision of this Court *in re* Ross, 140 U. S., 453, hereafter considered.

The construction of this section of the Act has been presented to at least two other district courts and by them fully considered.

In *Chambers* v. *Kestor*, 110 F. R., 432, Judge BRADFORD, in a careful and exhaustive opinion, holds that the Ac- applies to British subjects shipping upon a British vessel in an American port.

In "*The Troop*," 117 F. R., 557, Judge HANFORD adopted a similar construction of the Act. Both of these decisions discuss the case at bar, but decline to adopt the conclusion of the lower court and its interpretation of the Act.

In the latter case the Court vigorously contended against any restrictive construction or operation of the Act, as being contrary to the plain intendment of Congress and our moral standard of public policy, and said :

> "In the case of the *Eudora* (D. C.), 110 Fed. Rep., 430, the Court, by a curious process of reasoning, first emasculated the title of the statute, so as to limit its application to contracts of American seamen, then gave paramount and controlling effect to the title as thus curtailed, so as to annul the provisions of the twenty-fourth section, making it applicable to foreign ships, and then proceeded to change the nationality of American citizens by giving effect to the principle that seamen on board of merchant vessels take the nationality of whatever ship they may for the time being be engaged to serve, and this in a case in which the contract by which they became attached to the ship was a violation of a law of the country in which it was made. I am utterly unable to concur in a conclusion based upon such premises and the reasons assigned, and I deny that an American citizen can be deprived of the protection of the laws of his country, as if he had expatriated himself by signing an agreement which the policy of our government requires the courts to treat as a nullity."

In view of the reasonable and natural conception of the well defined purpose of the Act and the interpretation placed upon it by the judiciary—stimulated by the decision of the District Court below to an adverse view—it is manifest that Congress intended the Act to control the shipment of crews in American ports, irrespective of the flag of the vessel. There remains for consideration the second question.

II.

Has Congress legislative power to act? If so, the second question certified to this court must be answered in the affirmative, and "under the agreed statement of facts above set forth, upon a libel filed by said seamen after the completion of the voyage, against the British vessel, to recover wages which were not due them under the terms of their contract or under the law of Great Britain," the libellants are entitled to a decree against the vessel.

The learned Judge of the District Court held as a further reason for denying recovery, that Congress, in legislating upon the manner of hiring and discharging seamen by foreign vessels, has encroached upon the internal management of such vessels, to which extent it declared the act inoperative, and in so doing relied solely upon *in re Ross*, 140 U. S., 453. It is difficult to find any support in that case for the contentions of the appellee, viz.: that an American seaman shipping on a foreign vessel in one of our ports loses his citizenship to such an extent as to forfeit his right to the protection of our laws controlling such shipment; and that a foreign vessel may seek an American port for commerce, and while there ship a crew in violation of the law of the port.

In the *Ross* case a British seaman, then on board and in the service of an American vessel, killed the second officer thereof, while the vessel was lying in the port of Yokohama. He was tried and convicted of murder by the Consul General of the United States, pursuant to a treaty with Japan. Ross claimed that since he was a British subject the court had no jurisdiction. There is no question that but for this treaty he would have been tried in the Japanese tribunals and under Japanese laws. Congress recognized this right, conferred by international law, and desiring to avoid the partiality of such an unfriendly tribunal, entered into a treaty for the trial of "Americans committing offenses against Japanese," and

"Americans committing offenses in Japan." The court said (page 463),

> "After the rise of Islamism, and the spread of its followers, over Eastern Asia and other countries bordering on the Mediterranean, the exercise of this judicial authority became a matter of great concern. The intense hostility of the people of Moslem faith to all other sects, and particularly to Christians, affected all their intercourse, and all proceedings had in their tribunals. Even the rules of evidence adopted by them placed those of different faith on unequal grounds in any controversy with them. For this cause, and by reason of the barbarous and cruel punishments inflicted in those countries, and the frequent use of torture to enforce confession from parties accused, it was a matter of deep interest to Christian governments to withdraw the trial of their subjects, when charged with the commission of a public offense, from the arbitrary and despotic action of the local officials. Treaties conferring such jurisdiction upon these consuls were essential to the peaceful residence of Christians within those countries and the successful prosecution of commerce with their people."

Thus by the effect of this beneficent treaty, the jurisdiction of the local government was transferred to the Consul General of the United States. It was claimed in behalf of Ross that the Consular Court could not take jurisdiction of the offense since it was committed on board a vessel of the United States in Japanese waters, and that the petitioner being a subject of Great Britain was entitled to invoke the British laws. In other words, the defendant desired to seek the protection of the United States treaty, alleging service under the American flag, and thus escape the local tribunals, while at the same time he sought to deny the jurisdiction of the Consular Court (which derived its existence from that treaty) and the American law which it applied. This court sustained the jurisdiction of the Consular Court, and in so doing, gave utterance to that principle of law, so thoroughly misunderstood by the court below, to the effect, that when a foreigner enters the mercantile marine of a nation and becomes one of a crew

of a merchant vessel bearing its flag, he assumes a temporary allegiance to that flag; and in return for this protection, becomes subject to the laws by which that nation governs its vessels and seamen. In declaring this principle, however, the Court said: "The law which he violated was the law made by the United States for the government of United States vessels; the person murdered was one of his own superior officers whom he had bound himself to respect and obey, and it is difficult to see by what authority the British government can assume the duty or claim the right to vindicate that law or protect that officer" (page 473).

In the case at bar the facts are so widely different as to almost preclude argument. In the interest of public policy our government has seen fit to forbid the payment of advance wages to any seaman whether shipping upon foreign or domestic vessels. The British vessel "*Eudora*" sailed into one of our ports and in defiance of this law shipped a crew (some of whom were American citizens) for a voyage local in its character, paid the wages in advance, and upon the termination of the voyage in an American port, discharged them. The vessel when brought before our courts for the violation of this law, relying on the *Ross* case, endeavored to find comfort in the defense that such seamen, so shipping, became for the time being subjects of Great Britain, and that our government through comity would be obliged to tolerate this infraction of the law, since the English law sanctioned such shipments. In reply, it cannot be too strongly presented to this Court that a foreign law is never adopted by comity when contrary to the public policy of the country of the forum and prejudicial to its citizens; nor can foreign vessels be suffered to subvert our own law on the ground of comity. Furthermore, there is not one word to be found in the *Ross* case in support of any such false doctrine.

Judge BRADFORD, after a careful examination of this case, said (*Chambers v. Kestor*, 110 F. R., 432-446):

"I can discover nothing in the above quotation or

in any other part of the opinion countenancing the idea that it was beyond the power of Congress to prohibit, under a penalty, the prepayment on American soil or in American ports of the wages of seamen shipping in such ports on foreign vessels. Certainly, if such prohibition were beyond the legislative authority in the case of foreign seamen, it would be equally so in the case of American seamen, for under the doctrine of temporary allegiance, so clearly enunciated by the Supreme Court, the same argument would apply with equal force to both cases."

The doctrine of temporary allegiance to the "law of the flag" seems to have been thoroughly misunderstood by the Judge of the District Court, who utterly disregarded its origin and purpose and confused its relation to contracts and torts. Like every other branch of admiralty law, this doctrine was the outgrowth of necessity.

In a certain sense a vessel must be regarded as part of the territory of her country, and a person entering her employ does so with notice of her nationality and accepts the privileges with the responsibilities. If this contract of hiring is entered into pursuant to the "law of the flag," that law would generally be respected and applied through treaty or comity irrespective of the forum; but the moment rights beyond the mutual relations of the ship are infringed, the law of the forum is enforced. Thus, where a captain shipped in Italy under the Italian flag, upon distribution of proceeds of sale of the vessel sold here, it was held that his lien for wages given by the Italian law would be respected—but postponed to liens arising under the law of the forum. "*The Olga*," 32 F. R. 329. The Court said:

"As respects the liens arising upon the contracts made by the master within this jurisdiction and the proprieties of such liens in respect to all the claims on the ship, our own law, as the law of the place of the contract, as well as of the forum, should, I think, prevail."

The same Judge again clearly defined the limitation of the "law of the flag" in the "Scotia," 35 F. R., 907 in holding that supply men who furnished necessaries to a British vessel, in an American port on the master's orders, and on the credit of the vessel, have a maritime lien therefor, notwithstanding the English law and the general maritime law to the contrary. Judge BROWN there said:

> "Foreign ships like foreign citizens while dealing in another country with its citizens owe it a temporary allegiance; and as respects such contracts, they are subject to the law of that jurisdiction and to all the securities and remedies that the *lex loci* gives." (Citing numerous authorities.)

In "*The Brantford City*," 29 F. R., 373, it was held that

> "The 'law of the flag,' so called, expresses no principle of construction. So far as it differs from the general maritime law it is but the mere municipal law of the ship's home and has no authority abroad except by comity and will not be adopted in a different forum when against the policy or prejudicial to the citizens of the country of the forum."

It follows from these and numerous other decisions that in matters of contract the doctrine of the "law of the flag" has no application where the interests extend beyond the internal or municipal affairs of the vessel.

That the "law of the flag" would apply where a foreign crew is shipped in a foreign land on a foreign vessel has rarely been questioned. "*The Wexford*," 3 F. R. 577; "*The Adolph*," 7 F. R. 501; "*The Angela Maria*," 35 F. R. 430. But the question has frequently arisen as to the treatment of seamen on foreign vessels who have shipped in American ports, where treaties confer exclusive jurisdiction on the consuls. In those cases, our courts have invariably refused to entertain jurisdiction where the ends of justice fail to require it. The moment, however, the conduct of the officers

of the vessel amounts to a discharge of such seamen, or the cruelty is of such a character as to demand interference, such treaties have been to that extent suspended. "*The Burchard*," 42 F. R. 608; "*The Welhaven*," 55 F. R. 80; "*The Marie*," 49 F. R. 286.

Mr. Justice BRADLEY in "*The Belgenland*," 114 U. S. 355-363, discussing this phase of the matter said:

> "The consent of their consul or minister is frequently required before the court will proceed to entertain jurisdiction; not on the ground that it has not jurisdiction, but that, from motives of convenience or international comity, it will use its discretion whether to exercise jurisdiction or not; and where the voyage is ended or the seamen have been dismissed or treated with great cruelty, it will entertain jurisdiction even against the protest of the consul."

In "*The Salomoni*," 29 F. R. 534, it was held that where the master of an Italian vessel in one of the ports of the United States was guilty of a barbarous and malicious assault upon a seaman on said vessel, he is not protected by the terms of the consular compact conferring exclusive jurisdiction, and the district court may in its discretion take jurisdiction of the case for the protection of the seaman and the redress of his wrongs. To the same effect is the case of *Bolden* v. *Jansen*, 70 F. R. 505:

If the Court will extend relief in spite of a treaty conferring exclusive consular jurisdiction when conditions are necessitous, *a fortiori* will it be willing to exercise jurisdiction in the absence of such a treaty. In "*The Napoleon*," Fed. Cas. 10,015 the libellant, an American citizen, sued for wages earned on the British brig "*Napoleon*," on a voyage from New York to Jamaica and back. Exceptions were taken to the jurisdiction of the Court, since the vessel was a British bottom. Judge BETTS in passing on the matter said:

> "The exception taken to the jurisdiction of the Court because of the foreign character of the vessel and her master cannot prevail. It has not been proved that the libellant is an alien; and were it so, the law affords no

exemption of foreigners in their vessels from the jurisdiction of this Court. Nor if both parties were aliens would that fact affect the power of the court; it has cognizance of the subject matter, although, as a general usage, it forbears exercising its jurisdiction over controversies between foreign seamen and ship masters. But it is no way probable it would withhold it in such case when the suit is for wages by a seaman who had completed his contract and voyage and was discharged from his vessel. Nor would its jurisdiction be denied in case that voyage was broken up in an American port, leaving the crew in a necessitous condition with outstanding wages due them."

In *Patch* v. *Marshall*, Fed.Cas. 10,793, a still stronger case is presented. An American citizen shipped in Boston on the British brig "*Hope*" for a voyage to Cuba and return to a port of the United States. The voyage was accordingly made and the libellant duly discharged in Baltimore on the return of the vessel. While in Cuba, he was improperly imprisoned by the master and upon an action *in personam* against him obtained a decree. Upon appeal by the master in the Circuit Court the British Consul filed a protest against the jurisdiction of the Court because (1) The brig "*Hope*" was a British vessel and the respondent, her commander, a British subject; (2) an investigation of some of the alleged causes of damages must call in question official acts and conduct of a British functionary in regard to British subjects for which he is responsible only to his own government. Circuit Justice CURTIS said:

"But it does not follow that the conduct of the master of such a vessel, in procuring the official intervention of the consul, upon false allegations, to the injury of an American citizen by imprisonment in a foreign jail, is not to be here investigated. That depends on other considerations and is not distinguishable from any other wrong done by the master of which this Court should take or refuse jurisdiction according to the national character and domicil of the parties and the place of termination of the voyage."

It is true a vessel carries with it a certain exemption from local laws while in foreign ports, owing to political conditions commonly known as comity. In the interests of commerce generally, by common understanding, a vessel, while in a foreign port, is permitted to regulate those matters which pertain to its internal affairs and this privilege is co-extensive with the mutual relations of the ship. This must be recognized, however, as a matter of grace and not of right. By constitutional right Congress has exclusive power to regulate commerce, and in so doing may dictate a course of procedure in promotion of the moral health of the nation, to be recognized and respected by all vessels trading here. Whether or not the policy of the country was wise or discreet in the regulations claimed by the appellee to be rigid, is not a matter for judicial inquiry. It is enough that Congress has supreme power, and that, in the discharge of its duty, it has so declared its purpose. By what authority can the judicial branch of our government declare such regulations unlawful? Even assuming, for the sake of argument, that such regulations contravene the comity of nations, recognized by the general maritime law of Christian countries, surely the judiciary could not interfere. At most, it could but be declared an indiscretion on the part of the Legislature, in a matter in which it was supreme. It is to be borne in mind that the framers of the Constitution reposed in Congress a confidence as to its wisdom in such matters, and any hoped-for redress of the aggrieved must be sought in subsequent legislation.

Wharton, on "International Law," says:

> Sec. 33. "In the letter of Mr. Webster to Lord Ashburton of the 1st (8th) of August, 1842, the principles of the law of nations which apply to the subject were discussed with great clearness and ability. To that letter I refer you. It will be perceived that Mr. Webster does not propose the introduction of any new principle into the law of nations. He contends that 'a vessel on the high seas, beyond the distance of a marine league from the shore, is regarded as part of the territory of the nation

to which she belongs and subjected exclusively to the jurisdiction of that nation; and consequently if those who have charge of her endeavor in good faith to keep her at sea, that is, within that exclusive jurisdiction, and if contrary to their will she be forced within another jurisdiction by stress of weather, by violence or other necessity, she does not cease to be within the jurisdiction of her own country. In this case, however, such jurisdiction is not *exclusive* to all purposes! For any unlawful acts done by her *while thus lying in port and for all contracts entered into while there by her master and owners she and they must doubtless be answerable to the laws of the place.*'"

"Mr. Webster further contends that 'by the comity of the law of nations, and the practice of modern times, merchant vessels entering open ports of other nations for the purpose of trade are presumed to be allowed to bring with them and to retain for their protection and government, the jurisdiction and laws of their own country. *These, of course, extend over both persons and things, subject always to the laws of the place, in cases of crimes, contracts, etc., as above mentioned.*'"

"The right here claimed is not in derogation of the sovereignty of the place where the vessel may be, but is presumed to be allowed by that sovereignty."

This letter has been cited with approval by the Supreme Court *in re Ross* (*supra*).

It has been suggested that a line of decisions applying the "law of the flag" to the construction of the contract of hiring forms an exception. A more thoughtful consideration of these cases will show quite the contrary. In all of these decisions the law of the home port of the vessel was applied only when the contract was made or executed there. In other words, the law of the place where the contract was made or executed, was applied in construing it. The case of "*The Catherine*," 1 Peter, 104, is typical. It has even been held that the "law of the flag" applies where the seamen ship in American ports on foreign vessels for a voyage terminating in the land of the flag. "*The Pendergast*," 29 F. R., 127; "*The Brantford City*," 29 F. R., 373; "*The Olga*,"

32 F. R., 329. Where, however, the voyage is local in its character or terminates in an American port our courts have jurisdiction, and the "law of the flag" is ignored, for, by every principle of the law of contracts, it must be construed according to the law of the place where it is executed. Orr *v.* Achsah, Fed. Cas., 10,586; "*Lilian M. Vigus*," Fed. Cas., 8346. But by comity the "law of the flag" will be recognized, if, upon completion of the contract, that law only can be invoked by either party thereto. Where, however, pursuant to the agreement, or by breach of it through cruelty or otherwise, the voyage is ended here, our law, as the law of the place of execution, is applied; and this is so, even where the contract of hiring provides otherwise. If the master so shipping a crew on a voyage to this country and return, is guilty of a breach of contract, it is avoided *in toto*, and the "law of the flag" cannot prevail. The master cannot take advantage of the contract which he, himself, has broken: *Buecher* v. *Klorkgeter*, Fed. Case 2083; *Hayes* v. *Barque Wickwire*, 7 Phila. Rep. (Pa.), 594.

It is to be borne in mind that the voyage in question was from Portland, Maine, to Rio and back to an American port of discharge. In accordance with both common and maritime law such an agreement must be construed by the American law. If, therefore, our law applies in the construction of the contract, no argument is necessary in declaring that it must be respected in the making of such contracts.

A foreign vessel, which is by comity suffered to seek trade here and compete with our vessels only so long as it conforms to the laws which obtain for the regulation of commerce, may not on our soil ship a crew and deny it the protection afforded by Congress, solely because such seamen owe a certain temporary allegiance to a foreign flag as to matters of mutual concern. Even if this allegiance were of a more substantial character, it is to be remembered that the offence is committed before such seamen become members of the crew and before they owe any allegiance to

another flag. The very contract that binds them contravenes our laws.

> On this point it was said, in "*The Troop*," 117 F. R., 557, "The supposed lack of (legislative) power is not to be found in any clause of the Constitution limiting or prohibiting the exercise of power by Congress, nor on the broadest extension of the rule that statutes have no extra territorial force. Contracts for hiring sailors are subject to the general rule that the law of the place governs in the determination of all questions affecting the valid execution of contracts, and the place where such contracts are made is not on board the ship, but on the land. Sailors, whether citizens or aliens, until they become bound by the execution of a valid contract for service, are entitled to be protected by the laws of the land to the same extent as other persons."

It follows, therefore, that by virtue of the law of contracts, which prevails generally, the appellee has brought himself within the inhibition of the Act. The contract was made and executed here and must be subject to the prevailing laws. The moral side is not less strong.

The local laws must be respected in such matters, especially where by legislative enactment, abuses in practice have been corrected for the creation of more healthful environments for seamen generally and the promotion of commercial interests. If foreign vessels recognizing these laws seek our trade no reason can be assigned, either technically or ethically, in support of an infraction.

It is therefore in accordance with both authority and reason that a vessel while in a foreign port is subject to local laws in matters pertaining to contracts there effected. It has been a matter of regret frequently expressed in judicial decisions that Congress should fail to recognize the importance of establishing uniform shipping laws applicable alike to both foreign and domestic vessels and it is believed that these judicial utterances finally resulted in a much needed reform established by this act.

The first of these decisions arose under the Act of July 20, 1790, 1st Stat. 133, which was entitled "An act for the government and regulation of seamen in the merchant service." Section 4 provided that "if any person shall harbor or secrete any seaman or mariner belonging to any ship or vessel, knowing them to belong thereto, upon conviction he shall forfeit and pay a fine of ten dollars."

Under this law a Portuguese seaman was arrested for desertion from a Portuguese vessel while in the port of Boston. Judge STORY, in determining the matter (in *ex parte D'Olivera*, 1 Gallison 474) held that the act did not apply to foreign seaman on board foreign vessels, and said :

> "We are of opinion that the act for the regulation of seamen exclusively applies to seamen engaged in the merchant service of the United States. It may be a serious inconvenience that Congress has not extended the provisions to cases of foreign seamen in foreign vessels in compliance with that comity which it is understood many foreign nations exercised in favor of this country. Whatever may be the evil we can only regret it ; it is for another tribunal to apply the remedy."

This decision is of the greatest importance not only because of the author's eminence, but also because of the comprehensive scope of the Act. The Act, as its title suggests, established a uniform rule for the government and regulation of seamen. It required masters to ship the crew by written agreement declaring the voyage, term of time, and rate of wages. It provided a forfeit for a seaman's failure to present himself on board, or for absenting himself without leave, and fixed the penalty for desertion, and provided for a survey of an alleged unseaworthy vessel—also for the payment of one-third of a seaman's wages in every port, and for final payment, and it further provided a method for the recovery of wages and for an allowance of food.

This was the general scope of the Act which Justice STORY held Congress might enforce against foreign vessels, "in

compliance with that comity which, it is understood, many foreign nations exercised in favor of this country."

This view of the law has been frequently cited with approval, and a consideration of the decisions both in this country and in England show that no court has ever doubted the legislative power to protect the shipment and discharge of seamen within its territory. These decisions merely seek the legislative intent as expressed, and do not enforce the beneficial protection of the act against foreign vessels solely because of its limitation.

In *United States* v. *Kellum*, 7 F. R., 843, a criminal action was brought against defendant for receiving compensation from a seaman for securing him employment on a vessel. The title to the act which was claimed to have been violated was "The appointment of shipping commissioners * * * to superintend the shipping and discharge of seamen engaged in merchant ships belonging to the United States, and for the further protection of seamen." The section provides:

> "If any person shall demand or receive, either directly or indirectly, from any seaman or other person seeking employment as a seaman, or from any person on his behalf any remuneration whatever other than the fees hereby authorized for providing him with employment, he shall for every such offense be liable to a penalty of not more than one hundred dollars."

Judge WALLACE, in determining the case, said:

> "The title of the act * * * affords some evidence of the legislative intent; the several sections of the act, which throughout are consistent with the title, contemplate a surveillance by American officials of American vessels; and the definition in Section 65 for the purposes of the act, of a seaman as a person employed or engaged to serve in any capacity 'upon any ship belonging to any citizen of the United States'—all concur to demonstrate the scheme and scope of the act as designed to secure the protection of seamen in American ships throughout the hiring, service and discharge of such seamen."

In *United States* v. *McArdle* 2 Sawyer, 367, the Court said:

> "The subject of the protection of seamen is provided for in what may be called a chapter of the act entitled 'Protection of Seamen.' * * * They relate to the attachment and assignment of seamen's wages and the unlawful boarding of vessels and soliciting seamen to go on shore. From the terms used and the nature of things their operation is confined to ports and waters of the United States, and all their provisions are alike applicable to any seaman in an American port, without reference to the nationality of the vessel on which he is engaged, and there can be no doubt but that the best public policy of a commercial people, and the comity of civilized nations, demand that this should be so."

Judge BENEDICT, in *United States* v. *Anderson*, 10 Blatchford, 226, with reference to Section 62 of this act said:

> "Considering the general language of Section 62, and in view of the evil sought to be remedied thereby, and of the nature of the prohibition therein contained, the section is to be considered as intended to protect foreign vessels as well as vessels of the United States, and the fact that the vessel boarded by the prisoner was a foreign vessel is therefore of no avail as a defence in a prosecution under this section."

The English courts are in harmony with these decisions in looking solely to the intent of the act, without questioning the right of Parliament in the premises.

BLACKBURN, *J.*, in *Leary* v. *Lloyd*, 3 El. & El., 178, in considering the Merchant's Shipping Act, said:

> "After a careful consideration of the act, we are of opinion that the sections coming under the head of 'discipline' of which the section in question is one, have reference to the British ships alone."

The Customs Consolidated Act, of 1876, went further

and provided that all vessels engaging in the English coastwise trade should be equipped as to stores for the use of crew and in all other respects be governed by the same laws, rules and regulations to which British ships when so employed are now subject. *Kay on Law of Master and Seaman* § 769.

The inadequacy of legislative protection to foreign seamen in our ports was again called to public attention by the Circuit Court of Appeals for the Ninth Circuit in *Grant* v. *The United States*, 58 F. R., 694. The Court there said :

> "Notwithstanding the fact that public attention was, by the opinions above quoted from, called to the omission to extend these laws to foreign vessels and seamen, it has failed to change them in this respect, either in the revision or subsequent amendments. From this we think that acquiescence on the part of the legislative branch of the Government in the interpretations given by Story and Williams may be fairly inferred. Judge DEADY gives excellent reasons for the making of suitable laws for the protection of foreign seamen and vessels in our ports, and the case at bar illustrates the vicious practices to which he alludes. * * * But the evil of permitting such offences to go unpunished is not greater than the demoralizing effect of a decision which adds to or takes from the law. If the laws which we have are found to be insufficient when fairly interpreted, Congress should be called upon to amplify them."

Pointing out with unwavering unanimity the general protection to be extended to all seamen, and seeking only the real intent as expressed by legislation, these cases accept without question the power of Congress to regulate shipment and discharge, notwithstanding a recognition by them of the existence of corrupt practices, the correction of which they suggest. Now that Congress, presumably in response to these suggestions, has enacted uniform shipping laws, expressly applicable to foreign as well as domestic vessels, reforming the practice, it would be graceless indeed for any court to deny the legislative right. We are not, however,

driven to analogies or ethics in support of the Act, for it has been judicially passed upon.

Three decisions are worthy of special note; *Chambers* v. *Kestor*, 110 F. R. 432; "*The Troop*" 117 F. R. 557 and "*The Brantford*," 29 F. R. 394. In the first case Judge BRADFORD, of the District of Delaware, in a similar case, wrote a learned and exhaustive opinion applying the Act in favor of foreign seamen shipping on a foreign vessel in an American port. He discussed the decision of the District Court below in the case at bar and for well assigned reasons came to a different conclusion, being utterly unable to agree either that Congress did not intend the regulation of seamen shipping in our ports on foreign vessels or that it enjoyed no such power. In "*The Troop*," Judge HANFORD, also in a similar case, discussed both of these decisions and joined with Judge BRADFORD in sustaining the Act.

The "Brantford" is analogous. Judge BROWN there passed upon the validity of a bill of lading exempting the carrier from negligence, contrary to our law, but permissible by the "law of the flag." The cargo was shipped in Boston on a British vessel to a British port. It was held that since the contract was in contravention of the public policy of the country, it was for that reason illegal and void. In considering the question of comity the court declared that nothing could be more unequal or prejudicial to our own citizens or more suicidal in national policy than to tolerate in foreign ships the infraction of laws prescribed for the public welfare, with respect to contracts made in our ports. The court said:

> "Besides the above general considerations, a special reason why the foreign law could not, in any event, be adopted in this case, is found in the repeated adjudications of the Supreme Court that such stipulations are against the public policy of the country, and are on that ground illegal and void. Contracts, though designed to be performed elsewhere, are void, if criminal or illegal where made; *i. e.*, if the very promise or condition,

which is the consideration of the contract, as distinguished from the thing to be done by the other party, be illegal where made—the only exceptions being cases arising under the laws against usury; and a foreign law is never adopted by comity where it would be against the public policy of the country of the forum, and prejudicial to its citizens. Story, Confl. Laws, ss. 243, 244, 324; Westl. Priv. Int. Law, ss. 203, 204; Miller *v.* Tiffany, 1 Wall., 298, 310; Blackwell *v.* Weber, 23 Blatchf., 537; Hyde *v.* Goodnow, 3 N. Y., 269.

Nothing could be more unequal or prejudicial to our own citizens, or more suicidal in national policy, than to uphold, in favor of foreign ships, stipulations as respects carriage here or upon the high seas, which, when made by our own carriers, we declare to be against public policy, extortionate, and void. As respects such stipulations, foreign ships cannot stand on any different footing from our own, nor can a foreign law be suffered to subvert our own law to the prejudice of our own ships. No comity demands that. Whatever force, therefore, the law of the flag might ordinarily have abroad, it cannot override, in a foreign forum, these fundamental principles of international law. This plainly appears, also, from the same author above quoted, who makes the largest claim for the law of the flag, and who elsewhere says:

"Wide as the operation necessarily is which is given to the intention of the parties to a contract, it is plain that it can have no effect upon the question of the legality or illegality of the thing contracted for. No law can permit itself to be evaded, nor can it, consistently with the principles of international jurisprudence, sanction the evasion of a foreign law. Thus, if the thing contracted to be done is illegal by the law of the place of the intended performance, the contract should be held void, wherever it was actually entered into, by all courts alike. Where, however, it is the contract itself—the exchange of a certain consideration, either for any or for a certain promise—that one of the competing laws claims to forbid the question assumes a different form. In such a case it would seem that the legality of the agreement must be decided by the law of the place where it is made." Foote, Priv. Int. Law, 287, 288.

It is respectfully urged that the questions certified to this court for the proper decision of the cause be answered in the affirmative, in conformity with our national policy and the decisions heretofore rendered.

Respectfully submitted,

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